

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MELCHESTER PHILLIPS Jr.,

Plaintiff,

v.

PATRICIA AIKEN, et al.,

Defendants.

Case No. C11-05238RBL/JRC

REPORT AND RECOMMENDATION  
TO DENY IN FORMA PAUPERIS  
STATUS, DISMISS THE ACTION  
WITHOUT PREJUDICE

**NOTED FOR:**  
April 29, 2011

This civil rights action filed pursuant to 42 U.S.C. § 1983 has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (B) and Local Magistrate Judge Rules MJR 1, MJR 3, and MJR 4.

Before the court is a motion to proceed in forma pauperis (ECF No. 1). Because the underlying action changes the length of plaintiff's sentence and the amount of time he will be in custody it cannot proceed as a civil rights action. The court recommends in forma pauperis status be denied and this action be DISMISSED WITHOUT PREJUDICE.

1 Plaintiff challenges the length of two sentences and his offender score at sentencing (ECF  
2 No. 1, proposed complaint). He asks the court to vacate the sentences and for monetary  
3 damages. He is clearly challenging the length or duration of his confinement.

4 In June 1994, the United States Supreme Court held that "[e]ven a prisoner who has fully  
5 exhausted available state remedies has no cause of action under § 1983 unless and until the  
6 conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of  
7 habeas corpus." Heck v. Humphrey, 512 U.S. 477, 487 (1994). The court added:

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9 Under our analysis the statute of limitations poses no difficulty while the state  
10 challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A]  
11 § 1983 cause of action for damages attributable to an unconstitutional conviction or  
12 sentence does not accrue until the conviction or sentence has been invalidated.  
13 Id. at 489. "[T]he determination whether a challenge is properly brought under § 1983 must be  
14 made based upon whether 'the nature of the challenge to the procedures [is] such as necessarily  
15 to imply the invalidity of the judgment.' Id. If the court concludes that the challenge would  
16 necessarily imply the invalidity of the judgment or continuing confinement, then the challenge  
17 must be brought as a petition for a writ of habeas corpus, not under § 1983." Butterfield v. Bail,  
18 120 F.3d 1023, 1024 (9th Cir.1997) (*quoting* Edwards v. Balisok, 520 U.S. 641 (1997)).

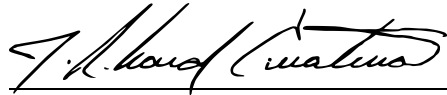
19 Here, plaintiff is challenging the length of time he has and will serve. He does not show  
20 that the state courts have addressed his claim or granted him relief. The allegations cannot be  
21 considered because they challenge the fact or duration of confinement.

22 A district court has wide discretion in deciding whether to grant an inmate the privilege  
23 of proceeding in forma pauperis. Here the action cannot proceed and should be dismissed prior  
24 to a grant of in forma pauperis status.

25 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
26 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.

1 6. Failure to file objections will result in a waiver of de novo review by the District Court Judge.  
2 See, 28 U.S.C. 636 (b)(1)(C). Accommodating the time limit imposed by Rule 72(b), the clerk is  
3 directed to set the matter for consideration on April 29, 2011 as noted in the caption.

4 Dated this 31st day of March, 2011.

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7 J. Richard Creatura  
8 United States Magistrate Judge  
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